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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
EAC 02 256 54033

Office: VERMONT SERVICE CENTER

Date: **SEP 23 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Jamaica who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

In a decision dated October 14, 2003, the director denied the petition, finding that the petitioner failed to establish that she is a person of good moral character.

On appeal, counsel for the petitioner submits a brief.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided . . . with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character; [and]

* * *

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The record reflects that the petitioner wed United States citizen [REDACTED] on October 7, 1986 in New York City, New York. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf that was approved. On August 3, 2002, the petitioner filed a Form I-360 self-petition claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her U.S. citizen spouse during their marriage.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) requires the petitioner to show that she is a person of good moral character.

Because the petitioner furnished insufficient evidence to establish that she is a person of good moral character, the director requested that she submit additional evidence. The director listed evidence the petitioner could submit to establish that she is a person of good moral character.

The director, in her decision, cited section 101(f) of the Act:

No person shall be regarded as, or found to be, a person of good moral character who . . . during such a period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eight days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period.

On appeal, counsel for the petitioner asserts that the petitioner was not confined to a penal institution for 180 days or more; hence, she is not statutorily barred from establishing good moral character pursuant to section 101(f)(7) of the Act.

The AAO concurs that subsection 7 of section 101(f) of the Act is inapplicable in the instant case. The record indicates that the petitioner was confined to a penal institution for only 118 days. Nonetheless, the AAO finds that the petitioner is statutorily barred from establishing good moral character pursuant to section 101(f)(3) because she was convicted of a violation of a law relating to a controlled substance.

Section 101(f) of the Act, 8 U.S.C. § 1101(f), states in pertinent part:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marijuana); if the offense described therein, for

which such person was convicted or of which he admits the commission, was committed during such period.

Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) provides, in pertinent part, that an alien is ineligible to receive visas and for admission if the alien is convicted of, or admits having committed, or who admits committing acts which constitute the essential elements of a violation of "any law or regulation of a State, the United States . . . relating to a controlled substance."

The record reflects that the petitioner was arrested on September 9, 1986 in Queens, New York on two charges:

Criminal sale of a controlled substance in the third degree
Class B Felony

Criminal possession of a controlled substance in the third degree
Class B Felony

The petitioner was convicted upon a guilty plea on the charge of criminal possession of a controlled substance in the fifth degree, Class D Felony: Queens County Superior Court. On November 13, 1987, she was sentenced to six months and a five-year probation.

Counsel for the petitioner further argues that Citizenship and Immigration Services (CIS) has the discretion to find the petitioner is a person of good moral character, notwithstanding her conviction.

If an alien is statutorily barred from establishing good moral character, as is the case here, CIS cannot exercise its discretion to find otherwise.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.